Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS	)	WT Docket No. 03-128

To: The Commission

PETITION FOR RECONSIDERATION

The Tower Siting Policy Alliance

John F. Clark, Esq.
Keith R. Murphy, Esq.
Jay Cobb, Esq.
Perkins Coie LLP
607 Fourteenth St. NW Suite 800
Washington, DC 20005

Submitted February 3, 2005

CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS	)	WT Docket No. 03-128

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules,[1] the Tower Siting Policy Alliance ("TSPA"), respectfully requests reconsideration of the specific provisions described herein from the *Report and Order*[2] adopted in the above-captioned proceeding and published in the Federal Register on January 4, 2005. Reconsideration and correction of the problems outlined here is necessary to avoid the unjustified and inequitable burdens that they will impose on the wireless industry.

I. INTRODUCTION AND SUMMARY

The *Report and Order* adopts sweeping revisions to the FCC's rules governing review of wireless communications facilities under Section 106 of the National Historic Preservation Act ("NHPA").[3] In the *Notice*, the Commission acknowledged that its goal in revising these rules was to streamline the historic review process in a manner that balanced the interests of the

---

[1] 47 C.F.R. § 1.429.

[2] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 04-222, Report and Order (rel. Oct. 5, 2004), *Erratum* (rel. Dec. 2, 2004); 70 Fed. Reg. 556 (Jan. 4, 2005) ("*Report and Order*").

[3] 16 U.S.C. § 470 *et seq.*

parties.[4] In pursuit of that laudable goal, the *Report and Order* adopts as a Commission rule the "Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission" ("NPA") executed as provided in the ACHP's rules[5] by the FCC, the Advisory Council for Historic Preservation ("ACHP") and the National Conference of State Historic Preservation Officers ("NCSHPO"). On March 7, 2005, the NPA will become part of the FCC's rules, binding the agency, wireless licensees, and all applicants for wireless, broadcast and other authorizations, and antenna structure registrations.

The TSPA asks the Commission to reconsider and correct several provisions of the NPA that diverge substantially from current rule and practice, and from the draft NPA. These provisions unfairly burden the Section 106 process and fail, either to balance adequately the interests of the parties, or to advance the main NPA goals of eliminating overly burdensome and unnecessary procedures, while fully protecting historic properties. Unfortunately, as crafted, these rules will not streamline the process, nor offer a corresponding increase in protection for historic properties.

The new extra burdensome requirements in the NPA involve archeological field surveys, tribal exemptions from exclusions, disparate treatment of tribal properties only visually affected, unlimited assertions of confidentiality, and excessive consulting party control over adverse effect mitigation. These provisions will not achieve their stated purposes. They are inequitable and unfair to the other parties to these consultations, and they impose on both the regulators and the regulated heavy burdens of cost, uncertainty and delay that cannot be justified.

---

[4] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, Notice of Proposed Rulemaking, 188 FCC Rcd 11,664 (2003); Errata, 18 FCC Rcd 12,854 (2003); 68 Fed. Reg. 40,876 (July 9, 2003) ("*Notice*").

[5] 36 C.F.R. § 800 *et seq.*

In addition, the petition highlights other issues from the NPA, including the danger in giving consulting parties a role in the negotiation on a memorandum of Agreement ("MOA") and the lack of ability to designate a lead agency in cases of joint federal jurisdiction.

For these reasons, the TSPA urges the Commission to reconsider the *Report and Order* and to revise the NPA and the corresponding rules as described herein.[6]

II. THE TOWER SITING POLICY ALLIANCE ("TSPA")

The FCC has acknowledged that the delivery of wireless services to Americans by a competitive wireless industry is a tremendous success story. To date, more than 160 million Americans subscribe to commercial mobile radio services.[7] In several other proceedings, the Commission has recognized the importance of network build out and the siting of wireless communications facilities to the provision of wireless service.[8] This proceeding was initiated with the goal of further improving the siting process while balancing the concerns of the interested parties.

In this regard, wireless carriers have an understandable interest in ensuring service is deployed in the most cost-effective and efficient manner for its customers. This is not only good business sense, but also good public interest sense.

The TSPA is a coalition of wireless carriers and tower companies concerned with federal policies that impact the siting of communications towers and facilities that will unduly burden the deployment of service. Members of the TSPA include American Tower Corporation, Cingular Wireless LLC, SBA Communications, Inc. and T-Mobile USA, Inc.

---

[6] *See* 47 C.F.R. § 1.429(b); 47 U.S.C. § 405(a).

[7] *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* Ninth Annual CMRS Competition Report, FCC 04-216, WT Docket 04-111, ¶ 5 (rel. Sept. 28, 2004).

[8] *See, e.g., In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Second Report and Order, FCC 03-290, CC Docket 94-102, IB Docket No. 99-67 (rel. Dec. 1, 2003).

The TSPA participated as a party on the record of this proceeding.[9] As such, the TSPA is an "interested person" under the Commission's rules, authorized to file a petition seeking reconsideration of the *Report and Order*.[10] In addition, each of the members of the TSPA qualifies as a "person aggrieved or whose interests are adversely affected" by the *Report and Order*, because each is engaged in the siting of the kinds of wireless communications facilities defined in the *Report and Order* as activities covered by the new Nationwide Programmatic Agreement ("NPA").[11] Therefore, when these newly adopted rules become effective, each TSPA member will be required to comply with these rules and will be subject to sanctions under the Commission's rules for failure to so. Each TSPA member is thus authorized to file this petition.[12]

III. DISCUSSION

In the *Report and Order*, the Commission adopts sweeping revisions to its rules governing the historic preservation review of wireless communications facilities under Section 106 of the NHPA.[13] The Commission has repeatedly emphasized that the twin goals of the NPA are to simplify and tailor the current Section 106 process to reduce or eliminate overly burdensome or unnecessary procedures, while fully protecting historic properties.[14] These two

---

[9] *See* 47 C.F.R. § 1.429(a); *see also* Letter from John F. Clark, Esq., Counsel to Tower Siting Policy Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 8, 2004); Letter from John F. Clark, Esq., Counsel to Tower Siting Policy Alliance, to Michael K. Powell, Chairman, Federal Communications Commission (Sept. 2, 2004).

[10] 47 C.F.R. § 1.429(a).

[11] *Report and Order*, Appendix B.

[12] *See North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985) (regional telephone companies had standing to challenge Federal Communications Commission order requiring them to file plans of reorganization, where Commission made clear that companies would face sanctions if they disobeyed the order).

[13] 16 U.S.C. § 470f.

[14] *See Report and Order*, Joint Statement of Chairman Powell and Commissioner Adelstein, Separate Statement of Commissioner Abernathy, Dissenting in Part.

goals are completely worthy, and equally important. As they are throughout most of the NPA, each must be given its full and appropriate weight and be carefully balanced, especially considering the critical issues public safety and national security that depend on a rapid and cost-efficient build out of the national wireless networks.

Unfortunately, the provisions of the NPA addressed in this petition will not streamline the process, and in fact will have just the opposite effect, while offering little or no corresponding increase in protection for historic properties as intended. When examined, it becomes apparent that the most burdensome new requirements in the NPA unfairly channel scarce compliance resources to achieve other goals, outside the purview and statutory limits of this programmatic agreement, and detrimental to the careful balance of public interests in the NPA.

These requirements, involve archeological field surveys, tribal exemptions from exclusions, disparate treatment of tribal properties only visually affected, unlimited assertions of confidentiality, and excessive consulting party control over adverse effect mitigation, that are not effective to achieving their stated purposes.

In short, the excessive burdens these provisions impose are unjustified and unnecessary. For these reasons they should be reconsidered and corrected.

A. Background of the NPA

In November 2001, an existing group sponsored by the ACHP and known as the Telecommunications Working Group ("TWG") began drafting a proposed programmatic agreement that was designed to tailor and streamline procedures for review of communications facilities under the NHPA. This programmatic agreement was to incorporate the Nationwide Collocation Programmatic Agreement ("NCPA") adopted in March of 2001 that the TWG had previously developed. The TWG was made up of representatives of the FCC, the ACHP, NCSHPO, American Indian tribes, the communications industry, and historic preservation consultants.

After more than a year of effort and numerous meetings by the full committee and six subcommittees, the TWG developed its own draft version of a Nationwide Programmatic

Agreement ("TWG NPA"). The TWG NPA was the product of hundreds of hours of discussion, give-and-take negotiation and compromise by representatives of a wide range of interests from federal and state government, industry and Indian tribes. Every provision was agreed to by group consensus, after being reviewed and reconfirmed multiple times. In February of 2003, the Commission took the TWG NPA draft in-house and incorporated virtually all of its provisions into the draft NPA released with the *Notice* on June 9, 2003.

According to the *Notice*, the draft NPA was intended to:

> tailor the Section 106 review in the communications context so as to improve compliance and streamline the review process for construction of towers and other Commission Undertakings. At the same time, the parties intend to advance and preserve the goal of the NHPA to protect historic properties, including historic properties to which Indian tribes and Native Hawaiian organizations ("NHOs") attach religious and cultural significance.[15]

The NPRM received fifty five comments and fifteen reply comments in the summer and fall of 2003. Thereafter, the Commission received or participated in scores of *ex parte* submissions and meetings with stakeholders where comments were extended or explained, and new positions explored. The *ex parte* submissions and discussions of most stakeholders were disclosed in the record of this proceeding as required by the Commission's rules.[16] The Commission's rules provide that submissions from and coordination with another federal agency with joint jurisdiction over the subject matter of a proceeding need not be disclosed on the record.[17] During the fall of 2003 and the winter of 2004 Commission staff held numerous other meetings with tribal representatives.

When the NPA was released on September 24, 2004, it contained many of the same provisions from the TWG NPA and the draft NPA released with the *Notice.* Some other

---

[15] *Notice* ¶ 1.

[16] 47 C.F.R. § 1.1206

[17] *Id.* § 1.1206(b)(3).

provisions were unknown to either document, and had not been previously disclosed to industry. Several of these provisions constitute major changes from current practice and the requirements of the ACHP rules, and these changes are the subject of this petition.

B. The NPA Requirements for Archeological Field Surveys are Unduly Burdensome and Unnecessary for the Protection of Historic Properties

The new provisions on archeological field surveys impose on industry some of the most dramatic and unexpected changes in compliance requirements of any in the NPA. These requirements are significantly more onerous and burdensome than the procedures employed in current practice, or than those proposed in the draft NPA. Specifically, the NPA provides that unless one of two narrowly defined exceptions applies, archeological field surveys must be conducted for every proposed new tower where the area of potential effects ("APE") for direct effects includes the potential for disturbing archeological resources.[18] The two exceptions are where:

1. [T]he depth of previous disturbance exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least 2 feet, as documented in the Applicant's siting analysis; or

2. [G]eomorphological evidence indicates that cultural resource-bearing soils do not occur within the project area or may occur but at depths that exceed 2 feet below the proposed construction depth.[19]

As a practical matter, however, these two narrow exceptions are unlikely to allow applicants to avoid many field surveys and as such their benefits are probably illusory. For one thing, it is unlikely that a qualified consultant[20] would be able to certify the required extent of previous ground disturbance without performing a field survey. For another, in most cases the

---

[18] *Report and Order*, Appendix B at B-20 (NPA § VI.D.2.f.).

[19] *Id.*, Appendix B at B-18 (NPA §§ VI.D.2.c.i, ii). In cases where these criteria are met, a field survey may still be required if the SHPO or an Indian tribe provide "evidence that supports a high probability of the presence of intact archeological properties." *Id.*, Appendix B at B-19 – B-20 (NPA § VI.D.2.d)

[20] Certification that an archeological field survey is not required must be made by a secretary-qualified professional. *Id.*, Appendix B at B-19 (NPA § VI.D.2.b).

only way to determine if soils at a site are "cultural resource-bearing" is to perform intrusive below-ground testing to see if the soils actually bear cultural resources. Therefore, it appears that in most cases under the NPA an archeological field survey cannot be avoided even if the exemptions do apply.[21]

Nothing in the record of this proceeding, or in experiences reported by practitioners in the field over the past few years, suggests or would justify an overly expansive, near universal requirement for archeological field surveys for every new tower. For instance, TSPA members report that although practices vary across the country, in most states today SHPOs determine on a case-by-case basis whether field surveys are required. Usually, the comprehensive ground-intrusive survey known as a Phase I archeological survey is only required when the SHPO requests one due to the SHPO's knowledge of archeological sensitivity of the site area. The exceptions include states like Arizona, Kentucky, and New Mexico, where the SHPOs require Phase I surveys for every project. In most other states, Phase I surveys have been requested only very infrequently, for fewer than 5% of tower projects.

Of the 95% of projects where surveys were not requested, TSPA members report that only very rarely have archeological resources been encountered, and these have been reported to the SHPO and evaluated. TSPA members agree that in the vast majority of cases under this generally accepted procedure, archeological resources were adequately protected and only in rare cases were previously unknown archeological resources discovered during construction

[21] This is true independent of the provisions requiring a field survey where an Indian tribe or a SHPO provides "evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects." *Id.*, Appendix B at B-19 – B-20 (NPA § VI.D.2.d, e).

The costs and delays associated with a Phase 1 archeological review are substantial.[22] TSPA members report archeological field survey costs in the range of $1,500 to $6,000 for a typical site, and $8,000 or even much more for difficult or remote sites. TSPA members also estimate that a typical Phase 1 archeological review can delay the Section 106 review process approximately 2 – 6 weeks or more. Although archeological reviews are certainly necessary in some cases, the requirement is needed in only a small percentage of cases, and an automatic universal review requirement will result in a huge increase of site development costs and delays, often with no corresponding benefit in protection of archeological resources.

In addition, there is a puzzling inconsistency between the field survey requirements in the NPA and the guidance on this point in the *Report and Order*. The *Report and Order* affirms the Commission position from the draft NPA[23] that "archeological field surveys should not be required where archeological resources are unlikely to be affected,"[24] explaining further that:

> Many facilities are placed in locations where the likelihood of affecting archeological resources is remote, such as on paved ground in a highly developed downtown area. Requiring onsite archeological work in these instances would add substantial delay and cost to facilities deployment to no appreciable benefit.[25]

The TSPA agrees with the Commission that a wireless site "on paved ground in a highly developed downtown area" should not be required to undergo an archeological field survey,

---

[22] The NPA does not define the term "archeological Field Survey." The term "Field Survey" is defined as "[a] research strategy that utilizes one or more visits to the area where construction is proposed as a means of identifying Historic Properties." *Id.*, Appendix B at B-7 (NPA § II.A.8.). The *Report and Order* implies that an archeological Field Survey involves something more than a mere site visit. *Id.* ¶¶130, 133 ("Requiring onsite archeological work in these instances would add substantial delay and cost to facilities deployment to no appreciable benefit." and "Under the circumstances, we find that a field survey [sic] in such narrow deep areas is infeasible . . .").

[23] The draft NPA proposed in the *Notice* was consistent with the assumptions implicit in the normal procedures practiced in the field and supported by participants in the TWG. The draft NPA provided that "no archeological field survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites" and that disagreements about the necessity for an archeological survey could be referred to the Commission. *Notice*, 18 FCC Rcd at 11,688-11,689.

[24] *Report and Order* ¶ 130.

[25] *Id.*

because such a site would have no real potential to affect archeological resources. The NPA, however, does not exempt such a site from this requirement, unless the site can be shown by a qualified archeologist to meet one of the two stringent tests involving previously disturbed ground or geomorphological evidence. The standard of the *Report and Order* is thus in conflict with the requirement of the NPA, and the NPA is inadequate to provide relief for the one circumstance that the *Report and Order* describes as deserving relief.

The *Report and Order* explains that "it is inadequate to give applicants general discretion to eschew an archeological field survey," and therefore the Commission states that the NPA "must define with specificity the circumstances where a field survey is not required."[26] Unfortunately, the NPA provides such specificity only for a small number of rare and difficult-to-prove cases that will probably require field surveys anyway. In all other cases, the NPA without discrimination or explanation requires archeological field surveys, even where the likelihood of effects to archeological resources may be clearly and demonstrably remote. This policy is without discernable logic, and imposes an arbitrary, ruinously expensive and unnecessarily wasteful requirement on the wireless industry.

On reconsideration, the Commission should eliminate this requirement and provide the specific guidance that the Commission acknowledges is necessary to allow unnecessary field surveys to be avoided. Alternatively, given the history of practical experience in this area, and the detailed information that will now be provided to the SHPO in submission packets, the NPA could reasonably allow SHPOs to determine case-by-case whether an archeological field survey is required. This method has long served the needs of both industry and SHPOs, expedited the process and provided very adequate protection to archeological resources.

C. Tribal Participation Provisions Unfairly Burden the Review Process

In the NPA, the FCC significantly changed the tribal consultation procedures currently in effect and followed by industry under the ACHP's rules. Some of these changes will

---

[26] *Id.* ¶ 131.

appropriately acknowledge the unique status of Indian tribes and Native Hawaiian organizations (herein "Indian tribes"), their special relationship with the federal government and their rights to consultation under the NHPA. Other changes, however, introduce to the Section 106 process problems of inconsistent and inequitable treatment of parties and historic properties.

In the process of altering the tribal participation sections of the draft NPA, the Commission apparently accepted many of the arguments advanced in tribal comments that tribes should be afforded different and greater authority in the Section 106 process than currently under the ACHP rules. In shifting the Section 106 process in this way, the FCC accepted many of the same arguments for special tribal prerogatives that the ACHP rejected in its own rulemakings.[27] Accordingly, the FCC has adopted an approach to tribal participation for communications undertakings that is new to federal practice, and one that assigns to Indian tribes a different role in the Section 106 process than is contemplated in the NHPA or in the ACHP rules.

This new role for tribes in the NPA goes well beyond the principle advanced in the NHPA that Indian tribes must be consulted when a property of significance to them is identified. And it goes beyond the standards in the ACHP rules that provide that Indian tribes must be provided a reasonable opportunity to: (1) identify its concerns about historic properties; (2) advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance; (3) articulate its views on the undertaking's effects on such properties; and (4) participate in the resolution of adverse effects.[28]

Of course, Indian tribes possess attributes that require special consideration in a federal consultation process. The federal government recognizes Indian tribes as domestic dependent nations,[29] with the powers of self-government. Through the United States Constitution, treaties,

---

[27] *See* Advisory Council on Historic Preservation, Protection of Historic Properties, 65 Fed. Reg. 77698, 77699-77717 (Dec. 12, 2000).

[28] 36 C.F.R. § 800.2(c)(2)(B)(2)(A).

[29] *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *see also Johnson v. McIntosh*, 21 U.S. 543 (1823). *See generally*, Felix S. Cohen,, Handbook of Federal Indian Law (1941).

federal statutes, Executive Orders, and federal case law, the federal government has established and defined a trust relationship with Indian tribes, which requires the government to adhere to certain fiduciary standards in dealing with Indian tribes.[30]

The TSPA and its members are mindful of the unique status of recognized tribes. They support the importance of tribal participation in the Section 106 process, and the inherent right and responsibility of Indian Tribes to protect and promote the welfare of their people, their lands and the historic properties of religious and cultural significance to them. The TSPA agrees that protection of tribal culture and history is an important aspect of tribal sovereignty, and the NPA must acknowledge and respect this principle.[31] It is certainly possible and desirable, however, to do so while at the same time protecting the fairness, integrity, balance and efficiency of the Section 106 process, and the closely related rights of applicants and consulting parties.

Under the ACHP's rules, in addition to their rights to be dealt with on a government-to-government basis, Indian tribes are granted some prerogatives not enjoyed by other consulting parties. These special provisions include: (1) An express right to be consulted under Section 101(d)(6) of the NHPA; (2) the requirement that the agency must make a reasonable and good faith effort to identify Indian tribes that might attach significance to properties that might be affected by an undertaking; and (3) the requirement that the agency must take certain required actions "in consultation with any Indian tribe that might attach religious and cultural significance to properties within the APE, "including: (A) making a reasonable and good faith effort to identify historic properties in the APE; (B) applying the criteria of National Register Eligibility to properties in the APE; and (C) applying the criteria of adverse effects to affected properties.

---

[30] See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) for a discussion of cases addressing the federal government's trust relationship with Indian Tribes.

[31] *Notice*, 18 FCC Rcd at 11,665.

In accordance with the NHPA, many of these prerogatives depend on the identification of a historic property to which the tribe attaches religious and cultural significance.[32]

In all other respects, the rights and responsibilities of Indian tribes in the Section 106 process under the ACHP rules have been carefully and fairly conformed to and balanced against those of other consulting parties, who have an equally important role in the process.[33] The NPA, however, affords to historic properties of significance to Indian tribes protections, requirements and status not provided to other historic properties. As discussed below, this disparate treatment is unjustified, unnecessary and counterproductive to the goals of the NPA

The TSPA urges the Commission to maintain the delicate and crucially important balance of rights and responsibilities among the parties to the Section 106 process, and to reconsider and reject aspects of the NPA that add arbitrary, unjustified, inequitable or excessive burdens to the process, without adding needed protection to historic properties.

1. The Arbitrary Exemption of Tribal Properties from Two Key Exclusions is Unjustified, Inequitable and Overbroad

The NPA takes advantage of Section 214 of the NHPA[34] and the ACHP regulations[35] to describe six categories of undertakings excluded from the requirements of Section 106 review.[36] Due to their nature, location or surroundings, effects to historic properties from these types of undertakings are presumed to be minimal or non-existent.

---

[32] 16 U.S.C. § 470a(d)(6).

[33] For example, both Indian tribes and other consulting parties are bound by the result where the SHPO has agreed with, or failed to timely respond to, a proposed finding of "no historic properties affected" or "no adverse effect." 36 C.F.R. § 800.5. In addition, all objections including tribal objections to findings of "no adverse effect" must be submitted within the 30-day review period. *Id.* § 800.5(c)(2).

[34] 16 U.S.C. § 470v.

[35] 36 C.F.R. § 800.14(c).

[36] The NPA describes six types of communications undertakings that will be excluded from Section 106 review, identified as: (1) tower modifications; (2) replacement towers; (3) temporary towers; (4) towers in industrial and commercial areas; (5) towers in rights-of-way; and (6) towers in SHPO-designated areas of low impact to historic properties.

Two of these exclusions are of particular importance to industry, including the exclusion for commercial and industrial areas (the "Industrial Area exclusion")[37] and the exclusion for telecommunications and utility rights-of-way (the "Right-of-Way exclusion").[38] These two exclusions were developed based on the belief that undertakings involving towers of limited height in largely developed commercial or industrial areas, or in utility rights-of-way near structures of similar height, should have little or no ability to cause visual adverse effects to historic properties.

Therefore, with one exception, all wireless projects that meet the criteria of the Industrial Area or Right-of-Way exclusions are excluded from all the procedures of Section 106 review. The exception is that excluded undertakings must nevertheless undergo the full tribal participation procedures. Put another way, the presumption of lack of potential for visual adverse effects on which the exclusions are based applies to all types of historic properties, except for properties of significance to Indian tribes.

These unique "exemptions from the exclusions" for tribal properties are demonstrably unjustified on this record, and in addition, they undermine the needed streamlining benefits promised from these two exclusions.[39]

a. The Exemption from these Two Exclusions for Tribal Properties is Unjustified

The basis of any programmatic exclusion, as required under the NHPA and the ACHP regulations, is that undertakings that qualify are unlikely to cause adverse effects to historic

---

[37] *Report and Order*, Appendix B at B-9 (NPA § III.D).

[38] *Id.*, Appendix B at B-9 – B-10 (NPA § III.E).

[39] As emphasized many times by the ACHP in the deliberations of the TWG, exemptions from exclusions should be avoided in any programmatic agreement. This is because they are often awkward to apply, unduly complicate and therefore undermine the very purpose of programmatic exclusions, and they can substantially diminish or eliminate the streamlining value of any exclusion, both to regulators and to regulated entities.

properties.[40] The rationale for allowing such exclusions is that they avoid the unnecessary waste of scarce compliance resources. The Industrial Area and Right-of-Way exclusions were carefully written to meet this standard, and both describe undertakings that, because of their limited size and the nature of their surroundings, will pose little or no threat of visual adverse effects to historic properties.

In the *Report and Order*, the Commission claims that it is necessary to exempt tribal participation from these two exclusions because historic properties of significance to Indian tribes are often not listed in the National Register of Historic Places ("National Register") or identified in SHPO inventories. The *Report and Order* states:

> Historic properties of traditional religious and cultural importance often are not listed in the National Register or other publicly available sources. Thus, in order to provide protection for these types of properties similar to that afforded to other historic properties by search of records, it is necessary to seek information directly from Indian tribes and NHOs.[41]

This argument, even if factually supported, which it is not on this record, does not justify the exemptions. First, the *Report and Order* provides no evidence or explanation as to why the Commission believes that properties of importance to Indian tribes are "often not listed in the National Register of other publicly available sources," and the record in this proceeding provides scant evidence to support the blanket assertions to this effect in the *Report and Order* and the comments.[42] While it is certainly probable that not all properties of significance to Indian tribes are identified in publicly available sources, this would also appear to be true of other types of historic properties. Virtually every SHPO has confirmed that their inventories of historic

---

[40] 16 U.S.C. § 470v.

[41] *Report and Order* ¶¶ 57, 64 (footnotes omitted).

[42] *See* Letter from George Keller, President, United South and Eastern Tribes, Inc., to Michael K. Powell, Chairman, Federal Communications Commission, WT Docket No. 03-128 (dated Jan. 27, 2004).

properties are far from complete.[43] Yet the exemption is not extended to all unidentified properties, but only to those of significance to Indian tribes. The point of these exemptions is not that there are no unidentified historic properties within the area of the exception, but rather that the incremental visual impact of communications tower on a historic property is likely to be minimal.

It is unfair to apply these two exclusions in all cases where unidentified but eligible historic properties, however significant, may be within the presumed APE for visual effects, but not apply them where the historic property is of significance to an Indian tribe. Conversely, if it is appropriate to exclude qualifying projects in industrial areas from review even when unidentified but eligible historic properties may be nearby, it is equally appropriate to apply the exclusion even though the unidentified properties may be of significance to an Indian tribe. Even if, as asserted, a much larger proportion of tribal properties than other types of historic properties are missing from SHPO inventories, this would not justify the disparate and inequitable treatment of this provision.

Accordingly, the TSPA urges the Commission to remove this exemption to the Industrial Area and Right-of-Way exclusions in the NPA.

b. The Exemption from these Two Exclusions for Tribal Properties is Overbroad

Even if tribal exemption from the Industrial Area and Right-of-Way exclusions could be justified on some basis, in their present form these exemptions are overbroad in their scope given the stated reason for the exemptions. The *Report and* Order asserts that the exemption from the Industrial Area and Right-of-Way exclusions for properties of significance to Indian tribes is necessary "in order to provide protection for these types of properties similar to that afforded to

---

[43] For example, the Maine SHPO notes in its "Cell Tower Review Process & Requirements" guidance that evaluation of previously unidentified properties is a "major component" of the Section 106 review process, as "there are many of these in the state of Maine." In the "Guidance for Cell Tower Review" document provided by the South Carolina SHPO, the SHPO notes that "most of the state has not been comprehensively surveyed." The Maryland SHPO guidelines that that "[t]hroughout Maryland numerous other properties have not yet been identified or evaluated."

other historic properties by search of records."[44] The exemption as written, however, provides not "similar" protection, but much greater protection than is provided for other historic properties.

The Industrial Area exclusion, for example, contains an extra level of protection for historic properties that contain or are exceptionally close to a project. This protection is contained in the provision that exempts from the exclusion projects that are "located within the boundaries of or within 500 feet of a Historic Property . . ."[45] All other historic properties of whatever type, whether or not identified on the National Register or in the SHPO's inventory, are deemed unlikely to be visually adversely affected by any project that meets the other criteria of the exclusion.

In contrast, the tribal exemption to this exclusion extends its protection to properties located anywhere within the limits of the APE for visual effects, which can be a radius of up to 1 ½ miles or more, depending on the recommendation of the SHPO and the height of the proposed tower.[46] Thus the scope of the exemption is much greater than the stated justification allows.

If evidence were submitted supporting a finding that historic properties of significance to Indian tribes are missing from SHPO records in higher proportion than other types of historic properties, such a finding might justify requiring contact with Indian tribes to identify tribal properties that may be located in or within 500 feet of a tribal historic property. Properties located further away than 500 feet, however, should be treated the same as other properties, as the exclusion presumes that any such properties, whether identified or not, are unlikely to be visually adversely affected.

The Right-of-Way exclusion is even more limited in its general protection exception. It exempts only undertakings located within the boundary of the historic property. Once again, the

---

[44] *Report and Order* ¶ 57.

[45] *Id.*, Appendix B at B-9 (NPA § III.D).

[46] *Id.*, Appendix B at B-17 – B-19 (NPA § VI.D.1).

tribal exemption is much broader, requiring full Section 106 review for properties located up to 1 ½ miles or more away.

The tribal exemption effectively eliminates both of these exclusions, snatching away the streamlining benefits and cost savings they were intended to create. On reconsideration, the Commission should eliminate the tribal exemption from the Industrial Area and Right-of-Way exclusions. If the exemption is retained, its scope should be strictly limited, consistent with the treatment of non-tribal historic properties.

2. Disparate Treatment for Tribal Properties Only Visually Affected is Neither Necessary nor Justified

Indian tribal properties are exempted from the NPA's new procedures for identification of properties only visually affected by communications undertakings.[47] For other, non-tribal properties, applicants are permitted to review certain records to determine visual effects to non-tribal historic properties, and are not required to hire expert consultants to perform site visits and wide ranging identification surveys. In contrast, under the new NPA applicants must engage secretary-qualified professionals for every new tower to perform site surveys to identify historic properties that might be of religious and historic significance to Indian tribes. The disparate treatment of tribal properties is unjustified, and the resulting huge additional costs and delays that will be imposed on the wireless industry in order to perform these identification reviews for tribal properties will create undue compliance burden on applicants and delay the completion of the wireless networks.

The Commission asserts that such an exemption is necessary because: (1) Indian tribes possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them; (2) Indian tribes may have confidentiality and privacy concerns about including sites of religious and cultural significance to them in publicly available records; and (3) identification and evaluation of historic properties without the involvement of

---

[47] *Id.*, Appendix B at B-17 (NPA § VI.D.1.a.)

potentially affected Indian tribes would create an unacceptable risk that properties of significance to them may be overlooked. [48]

These explanations, however, fail to support the implementation of divergent and inequitable procedures for identification of tribal properties. The special and specific rights of consultation for Indian tribes provided in Section 101(D) (6) of the NHPA attach when an Indian tribe "attaches religious and cultural significance to a historic property."[49] This provision of the NHPA provides no special rights for extra identification procedures not afforded to other consulting parties or other kinds of historic properties.[50] The ACHP recognizes that the plain language of the statute does not mandate that federal agencies conduct surveys to identify historic properties,[51] a position informed by the FCC's statutory responsibility to ensure an efficient communications service, whose purposes include national defense and promoting safety of life and property. [52]

In addition, the ACHP has officially recanted the statement in its rules, relied upon by the Commission in the *Report and Order*,[53] that Indian tribes "possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[54] In a later comment on this provision, the ACHP has stated:

---

[48] *Id.* ¶ 125.

[49] 16 U.S.C. § 470a(d)(6).

[50] *Id.; see also Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 167 (1st Cir. 2003) ("Where no historic property has been identified, the Tribe has no basis under the NHPA to demand particular actions by the [agency].").

[51] *See* Letter from Javier Marques, Associate General Counsel, Advisory Council on Historic Properties, to Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division, Federal Communications Commission, at 2 (dated March 5, 2004) ("*Marques Letter*"); *see also Nat'l Mining Ass'n v. Slater*, 167 F.Supp.2d 265 (D.D.C. 2001).

[52] *See Marques Letter* at 3; *see also* 47 U.S.C. § 151.

[53] *Report and Order* ¶ 125.

[54] 36 C.F.R. § 800.4(c)(1).

> The Council clarifies that tribal expertise is not in applying the eligibility criteria per se, but in bringing a special perspective to how a property possesses religious and cultural significance.[55]

The ACHP thus recognizes that tribal expertise is not in determining which properties are eligible for the National Register, but in identifying which properties are of significance to the tribe. The ACHP also makes clear that the determination of the eligibility of a historic property (and therefore identification of the existence of such property) must always come first, before a determination of tribal significance.[56]

Finally, confidentiality and privacy concerns are common to many kinds of sensitive properties, and the need to protect vulnerable historic properties from unnecessary exposure to damage or destruction is not be unique to Indian tribes. The ACHP rules and SHPO procedures are designed to protect such properties. [57] Although Indian tribes may have mistrusted these procedures in the past, under the NPA even without special identification provision, interested tribes would still be contacted and have the opportunity to identify to the applicant, the SHPO or the FCC properties of significance within the APE for visual effects to a given project.

Because the great expense attendant to disparate and preferential identification treatment of tribal properties is not justified, the TSPA urges the Commission to reconsider the provisions in the tribal participation section to provide for consistent treatment for all consulting parties and for uniform consideration of visual effects to all historic properties.

3. The NPA Confidentiality Standards are Overbroad

The NPA addresses the confidential treatment of tribal information during Section 106 consultation.[58] The NPA states "[i]f an Indian tribe or NHO requests confidentiality from the

---

[55] 65 Fed. Reg. 77706 (December 12, 2000).

[56] 36 C.F.R. § 800(a)(3).

[57] *See id.* § 800.11(c).

[58] *Report and Order*, Appendix B at B-14 (NPA § IV.I.).

Applicant, the Applicant shall honor this request . . ."[59] This provision expands without explanation the confidentiality standards of Section 304 of the NHPA[60] and the ACHP's rules,[61] which only permit confidential treatment of information that might expose a historic property to damage or destruction or that would otherwise cause an invasion of privacy.

The NPA confidentiality provision amounts to an automatic grant of confidential treatment of any matter on tribal request. Experience shows that in many consultations, Indian tribes assert the right to consult with the FCC in private, without participation, review or involvement by the applicant, the SHPO or the public. Tribes have also been known to assert the right to confidential treatment of all information about all historic properties, whether publicly known or unknown or not. These requests have seemed not related to protection of vulnerable historic properties, but to other issues. TSPA therefore urges the Commission to make clear that Section 106 consultations with all parties are to be conducted openly. In addition, the NPA should be revised to conform the treatment of confidential information to the procedures and standards in the NHPA and the ACHP's rules.

D. Consulting Parties Should Not Be Given Veto Power over the Terms of a Memorandum of Agreement

The NPA does not specify who may be a signatory to a MOA, a key document In the Section 106 process that provides the exclusive method for resolving adverse effects under both the ACHP's rules[62] and Section 110(l) of the NHPA.[63] The NPA does, however, inject

---

[59] *Id.*

[60] 16 U.S.C. § 470w-3.

[61] 36 C.F.R. § 800.11(c).

[62] *Id.* § 800.6(c).

[63] 16 U.S.C. 470h-2

confusion into the issue by giving consulting parties a role in negotiating any MOA,[64] and by apparently giving consulting parties approval authority over the mitigation measures that the MOA must contain.[65]

Under the ACHP's rules, only the federal agency and the SHPO/THPO, or the ACHP are guaranteed the right to be a signatory to an MOA.[66] The federal agency, in its discretion, may invite additional parties, including consulting parties, to become signatories, but the agency is not required to do so. Federal agencies are only encouraged to invite any party that assumes a responsibility under the MOA to become a signatory.[67] And even when invited to become signatory, the ACHP rules are careful to provide that such signatories cannot prevent adoption of an MOA.[68]

By requiring consulting parties to participate in the negotiation of any MOA, and by further requiring the agreement of all parties, apparently including all consulting parties, to all mitigation measures, the NPA adopts another anti-streamlining measure that is a major departure from current practice. As the ACHP rules impliedly recognize, giving consulting parties what amounts to veto power over the all important MOA stage of the process is a bad idea that will unnecessarily increase the potential for contention, confusion and delay, without increasing real protection to historic properties.

---

[64] *Report and Order*, Appendix B at B-24 (NPA § VII.D.4) ("The Applicant, SHPO/THPO and consulting parties shall negotiate a [MOA] that shall be sent to the Commission for review and execution" to resolve an adverse effect.).

[65] *Id.*, Appendix B at B-24 (NPA § VII.D.5) ("If the parties are unable to agree upon mitigation measures, they shall submit the matter to the Commission.").

[66] 36 C.F.R §§ 800.6(c)(1),(2)

[67] *Id.* § 800.6(c)(2).

[68] In its 2000 rulemaking, the ACHP specifically clarified the role of signatories in the MOA process, stating in the preamble to the rules that "[t]he term 'signatory' has a special meaning as described in [the rules], which is the ability to terminate or agree to amend the Memorandum of Agreement. The term does not include others who sign the agreement as concurring parties." 65 Fed. Reg. 77698, 77708, 77721 (Dec. 12, 2000).

The TSPA urges the Commission to clarify the NPA on this point, and conform to the ACHP rules. Consulting parties, including Indian tribes, should certainly be able to have input into the MOA, but they should not automatically be made signatories, and the agreement of consulting parties should not be required for an MOA to be effective.

E. The NPA Should Make Provision for Designating Lead Agencies for Undertakings with Multiple Federal Involvement

Section 800.2(a)(2) of the ACHP's regulations provides for the designation of a lead federal agency in cases where more than one Federal agency is involved in an undertaking. Section 800.2(a)(2) has no counterpart in the NPA and no provision of that document addresses the case of multiple-agency jurisdiction over a single undertaking. A similar provision in the NPA would be very helpful to telecommunications projects that face hostile or unfamiliar regulations or regulators from other agencies and that could be approved by the FCC as lead agency. This provision could impact tower siting in those situations where, for one example, an FCC-licensed wireless site is proposed on federal lands.

IV. CONCLUSION

The NPA is the product of intensive negotiations involving many agencies and groups over three years. Although many of the provisions of the NPA are consistent with the stated streamlining and historic preservation goals of the agreement, others are not. The provisions discussed in this petition will unnecessarily and substantially increase the burdens of cost, complexity, uncertainty and delay for Section 106 compliance. Neither this industry, nor the state and federal agencies that will be charged with managing the Section 106 process under the NPA, nor the public that depends on the rapid buildout of the networks that serve them, can afford the obvious and predictable consequences of expense and delay that are sure to come if the provisions outlined in this petition are not ameliorated.

The public interest will best be served by prompt reconsideration and correction of the provisions in the *Report and Order* as described in this petition

Respectfully submitted,

The Tower Siting Policy Alliance

_____

John F. Clark, Esq.
Keith R. Murphy, Esq.
Jay Cobb, Esq.
Perkins Coie LLP
607 Fourteenth St. NW Suite 800
Washington, DC 20005

JFC:jfc